NO. 86-319

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CPT JOHN R. VAN DRASEK, U.S.M.C. (RET.),
Petitioner,

v.

JOHN F. LEHMAN, JR.,
SECRETARY OF THE NAVY,
CHAPMAN COX,
ASSISTANT SECRETARY OF THE NAVY
FOR MANPOWER AND RESERVE AFFAIRS,
AND
THE UNITED STATES OF AMERICA,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

I. FIRST AND FIFTH AMENDMENT CLAIMS ARISING IN THE COURSE OF MILITARY SERVICE ARE COGNIZABLE IN THE FEDERAL COURTS 1

II. CIVILIAN COURT REVIEW OF CONSTITUTIONAL CLAIMS BY MILITARY PERSONNEL IS NOT DIMINISHED BY EXHAUSTION OF INTRA-SERVICE REMEDIES 5

III. *CHAPPELL V. WALLACE* DOES NOT BAR JUDICIAL REVIEW OF CONSTITUTIONAL CLAIMS BY MILITARY PERSONNEL FOR EQUITABLE RELIEF 7

CONCLUSION 10

TABLE OF AUTHORITIES

CASES **Page**

Allen v. McCurry, 449 U.S. 90 (1980) 6
Bivens v. Six Unknown Agents, 403 U.S. 388 (1971) 7
Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485 (1980) 5
Chappell v. Wallace, 462 U.S. 296 (1983) ..... *passim*
Connick v. Myers, 461 U.S. 138 (1983) 3,5
Edwards v. South Carolina, 372 U.S. 229 (1963) 5,6
Feres v. United States, 340 U.S. 135 (1950) 7
Gilligan v. Morgan, 413 U.S. 1 (1973) 8
Jacobellis v. Ohio, 378 U.S. 331 (1946) 5
New York Times v. Sullivan, 466 U.S. 254 (1964) 5
Patsy v. Board of Regents of State of Florida, 457 U.S. 496 (1982) 6
Pennekamp v. Florida, 328 U.S. 331 (1946) 5
Pickering v. Board of Education, 391 U.S. 563 (1968) 4
Schlesinger v. Ballard, 419 U.S. 498 (1975) 8
Stump v. Sparkman, 435 U.S. 349 (1978) 8
Supreme Court of Virginia v. Consumeres Union of the United States, et al., 446 U.S. 719 (1980) 8
Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969) 9

CONSTITUTIONAL PROVISIONS
United States Constitution

Amendment I ..... *Passim*
Amendment V ..... *Passim*

STATUTES

10 U.S.C. Section 1552(a) (1982) 6,7
10 U.S.C. Section 5947 (1982) 4
Article 138, Uniform Code of Military Justice (1969), 10 U.S.C. Section 938 (1982) ..... *Passim*

REGULATIONS **Page**

Navy Regulations (1973) ("NAVREGS") Ch.11 4

LAW REVIEWS

Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L.Rev. 181 (1962) 9

INTRODUCTION

Respondents, at pages 16-17 and 18-32 of their brief, attempt to split petitioner's claims and to remove them from their factual context to prevent this Court from resolving the question upon which the Court granted review.

The question as it is presented in the context of this 'whistleblower' case is whether a service member may seek relief in a civilian forum when his military career has been prejudicially terminated because he spoke out against violations of constitutional, statutory and regulatory authority in the service.

Petitioner's brief presents a question beyond mere review of the Article 138 Complaint for procedural and substantive correctness, and neither is his principal and first argument, at pages 26-30, so limited.

Petitioner asks this Court to reverse the decision of the United States Court of Appeals for the Federal Circuit in order to have the matters which were presented by petitioner's Article 138 Complaint, together with endorsements thereto, considered as a part of his claims under the First and Fifth Amendments. Thus, petitioner seeks independent scrutiny of the entire record in resolution of his suit for equitable relief for constitutional, statutory and regulatory violations committed by his superior officers which infringed his right to free expression of protected speech.

I. FIRST AND FIFTH AMENDMENT CLAIMS ARISING IN THE COURSE OF MILITARY SERVICE ARE COGNIZABLE IN THE FEDERAL COURTS

Respondents concede that civilian courts may hear constitutional claims by military personnel. Resp. Br. 44. That the petitioner, consistent with the determination of this Court in *Chappell v. Wallace*, 462 U.S. 296, 302-303 (1983), sought to avail himself of intra-service and

administrative remedies, by Article 138 Complaint and before the Board for Correction of Naval Records ("BCNR"), respectively, before seeking redress in the district court, does not justify the reduction or elimination of his constitutional claims in civilian courts. Were this so, a federal court could refuse to hear claims a service member raised in the first instance by Article 138 Complaint by claimed lack of jurisdiction; and simultaneously refuse to hear claims not presented by Article 1381 Complaint for the service member's failure to exhaust intraservice remedies. The courts below erred by failing to honor the determination of this Court in *Chappell v. Wallace*, 462 U.S. 296, 305 (1983), that "This Court has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service" (citations omitted).

Honoring the decisions of this and lower Courts, petitioner has shown the deference to military authorities in military matters which the law requires. Having been denied relief, petitioner applied to civilian courts to rule upon First and Fifth Amendment claims arising from his having petitioned his government for the redress of grievances regarding equal employment opportunity and corruption of military tribunals by command influence.

Respondents incorrectly argue that petitioner urges "plenary" or "routine" review of Article 138 proceedings (Resp. Br. 35, 36-43). Petitioner seeks review of Article 138 proceedings for the constitutional, statutory and regulatory violations suffered in the course of military service. Specifically, in the context of this 'whistleblower' action, petitioner seeks to have the infringement of his protected speech reversed where he sought to have the Marine Corps respect equal employment opportunity and prevent command influence over military tribunals.

Thus arises the petitioner's original formulation of the question presented in the petition granted by the Court; that is, [w]hether citizens should be barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service" (Pet. i).

The courts below were required independently to scrutinize the whole record to insure protected speech is not infringed by retaliatory employment action.[1] Instead the district court decision, adopted by the court below, ruled that the court lacked jurisdiction to review the merits of petitioner's Article 138 Complaint (Pet. App. A-4 to A-6). The district court's entire explanation for rejecting petitioner's First Amendment claim was:

> [t]he investigation, report of findings, and remedial action satisfy the minimum standards of procedural due process. *Plaintiff's allegations of first amendment violations similarly do not warrant relief.* Pet. App. A-6 (emphasis added).

Petitioner claims that his military service was compromised on a basis that infringed his constitutionally protected interest in freedom of expression. *See Connick v. Myers*, 461 U.S. 138, 142-143 (1983) (and cases cited therein). Reiterating "that speech on public issues occupies the 'highest rung of the hierarchy of First Amendment

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[1]Respondent's contention that petitioner does not present a justiciable controversey at this stage of the litigation for lack of standing (Resp. Br. 24-25) ignores petitioner's disability retirement as a captain where correction of retaliatory fitness reports and resultant promotion passovers would entitle petitioner to consideration for the rank of major in his retirement. Respondents' argument depends upon the artificial division of his First Amendment claim into separate claims based upon the respective jurisdictional authorities of the BCNR and Article 138 proceedings. But, the Article 138 proceedings are inseparable from the events leading to petitioner's discharge from the Marine Corps.

values,' and is entitled to special protection" (*Id.* 461 U.S. at 145) (citations omitted), Justice White, writing for the majority reviewed the antecedents and progeny of *Pickering v. Board of Education*, 391 U.S. 563 (1968), in ruling that speech on a matter of public concern requires a reviewing court to scrutinize the reasons for discharge. *Id.* 461 U.S. at 146.[2]

As petitioner's speech addressed observance of equal employment opportunity and corruption of military tribunals by command influence it is submitted that the speech was unquestionably of public concern.

The protection to be accorded petitioner's speech is the greater because of the statutory and regulatory authorities requiring him to address the wrongs he perceived. *See* 10 U.S.C. Section 5947 and Navy Regulations ("NAVREGS") Chapter 11 (1973), paragraphs 1102 and 1139 discussed in petitioner's brief at pages 44-45. It is further significant that petitioner, from his earliest meeting with his commander through resort to civilian court, pursued his lawful obligation to report the offenses he observed solely by the resort to statutory and regulatory procedures. *See* Article 138 of the UCMJ,10 U.S.C. Section 938 (1982) and Ch. 11, NAVREGS, paragraph 1106, Pet. Br. 44.

The constitutional determination requires a balancing between the interests of the employee, as a citizen, in commenting on matters of public concern, and the interest of the employer in promoting the efficiency of the public services it performs. *Connick v. Myers, supra*, 461 U.S. at 142 *quoting Pickering v. Board of Education, supra*, 391 U.S. at 568. Here, it is submitted that speech required by law and wholly regarding matters of public concern is entitled to the greatest judicial protection by scrutiny of the entire record.

The First and Fifth amendment require a reviewing court "to examine ... the statements in issue and the circumstances under which they [are] made ..." and the

[2]The inquiry into the protected status of the petitioner's speech is one of law, not fact." *Id.* n. 7.

reviewing court "cannot 'avoid making an independent constitutional judgment on the facts of the case.'" *Connick v. Myers, supra*, 461 U.S. at 151, n. 10 *quoting Pennekamp v. Florida*, 328 U.S. 331, 335 (1946) and *Jacobellis v. Ohio*, 378 U.S. 184, 190 (1964) (further citations omitted), respectively.

The fundamental flaw in the decision below is the affirmance by adoption of a district court decision which failed to honor this Court's repeatedly stated "obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgement does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984) *quoting New York Times Co. v. Sullivan*, 376 U.S. 254, 284-286 (1964) (further citations omitted). The duty of the federal courts to "make an independent examination of the whole record" in the context of claimed infringement of protected rights of free speech and freedom to petition for the redress of grievances is not confined to defamation actions and protected speech in the context of public employment. *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963). *Edwards* is particularly instructive here as the infringement of protected First Amendment rights was determined despite the state court criminal conviction for breach of the peace.

II. CIVILIAN COURT REVIEW OF CONSTITUTIONAL CLAIMS BY MILITARY PERSONNEL IS NOT DIMINISHED BY EXHAUSTION OF INTRA-SERVICE REMEDIES

By arguing that judicial review of Article 138 proceedings is inappropriate (Resp. Br. 31-43), the respondents would have this Court give preclusive effect to the intra-military determinations of the Article 138 proceedings in derogation of the federal court's obligation to independently review

protected speech in the entire context of the retaliatory action which is claimed to have infringed the First and Fifth Amendment rights.

Respondents would have this Court rewrite what is essentially deference to military control by an exhaustion of remedies requirement, to bar federal court enforcement of the Constitution, in this case of the First Amendment, by preclusion of issues first presented for review within the military.[3]

The matter is here aggravated as a result of abdication by the BCNR of its mandate, pursuant to 10 U.S.C., Section 1552(a), to review any military record, including the Article 138 record, which curtailment the district court accepted.

By stripping the factual record of petitioner's and others' Article 138 Complaint, and of the processing thereof, first the BCNR and then the district court only considered a portion of petitioner's claim of retaliatory action for his protected expressions.

In short, petitioner asks this court to rule not simply that the Article 138 Complaint in this case is reviewable but that petitioner's First and Fifth Amendment claims must be reviewed with the record of Article 138 Complaint included in the federal court's determination of petitioner's equitable claim. Thus, if this Court finds that review of the Article 138 Complaint must first be undertaken before the BCNR, petitioner asks that the decision below be reversed with instructions that the BCNR undertake the review.

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[3]Exhaustion of administrative remedies does not give rise to issue preclusion, and especially does not bar federal court review of infringement of protected speech. Compare *Patsy v. Board of Regents of State of Florida*, 457 U.S. 496, 501, 513-514 (1982) with *Allen v. McCurry*, 449 U.S. 90,94-96 (1980) and *See Edwards v. South Carolina*, *supra*, 372 U.S. at 235.

Should this Court determine, either that the BCNR lacks jurisdiction under 10 U.S.C. Section 1552(a) (1982) to review the Article 138 Complaint, or that the final action taken in this instance by the Secretary of the Navy in regard to both Article 138 and BCNR proceedings makes direct resort to the district court more appropriate, then remand to the district court is sought.

III. *CHAPPELL V. WALLACE* DOES NOT BAR JUDICIAL REVIEW OF CONSTITUTIONAL CLAIMS BY MILITARY PERSONNEL FOR EQUITABLE RELIEF

In determining the proper relationship between civilian courts and the military, this Court has refused to permit interference with military order and discipline by allowing military personnel to institute actions for damages against a commanding officer. *Chappell v. Wallace*, 462 U.S. 296 (1983). *See also Feres v. United States*, 340 U.S. 135 (1950).

Respondents' reliance upon *Chappell v. Wallace* (Resp. Br. 42-49) is misplaced. *Chappell* involved plaintiffs who had never pursued *any* administrative remedies, but instead had filed a claim against superior officers under *Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971) for race discrimination, and seeking to recover damages. This Court in *Chappell* held that "enlisted military personnel may not maintain a suit *to recover damages* from a superior officer for alleged constitutional violations." *Chappell v. Wallace*, *supra*, 462 U.S. at 305 (emphasis supplied). This Court did say that "civilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlised military personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the military establishment." *Chappell v. Wallace*, *supra*, 462 U.S. at 300. But this concern was limited by this Court's further explanation that it would be undermined, not by review of

equitable constitutional claims or review of administrative procedures, but by "a judicially created remedy exposing officers to personal liability at the hands of those they are charged to command." *Chappell v. Wallace, supra*, 462 U.S. at 304.

As respondents concede, "[a] serviceman with constitutional claims may in certain circumstances bring those those claims directly to federal court". Resp. Br. 44, and 45-46, citing *Goldman v. Weinburger; Brown v. Glines; Parker v. Levy* and *Frontiero v. Richardson*. To the foregoing list could be added *Schlesinger v. Ballard*, 419 U.S. 498 (1975), as another example of federal court review of a due process challenge, in that case based on sex discrimination arising in the context of discharge by promotion passover. What these cases have in common and what distinguishes this case and those from the damage actions sought to be maintained in *Feres v. United States* and *Chappell v. Wallace* is analogous to the same considerations giving rise to the distinction between absolute judicial immunity from damage suits and the lack of bar by judicial immunity to declaratory and injunctive relief. *Compare Stump v. Sparkman*, 435 U.S. 349, 364 (1978) (state judge absolutely immune from damages liability for judicial act even if erroneous) with *Supreme Court of Virginia v. Consumers Union of the United States, et al.*, 446 U.S. 719, 735-737 (1980) (state supreme court and chief justice properly held liable for equitable relief in their enforcement capacities).[4]

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[4]A third category of cases, of which *Gilligan v. Morgan*, 413 U.S. 1 (1973) is a singular example, arises where the federal courts are asked to exercise continuing regulatory jurisdiction over enlistment, training, discipline, equipping and purely discretionary activities of the military. Petitioner does not, for example, ask the federal courts to tell the Navy how to have a sailor tie knots or the Army how to have a soldier shoulder a rifle. To the contrary, petitioner asks that the federal courts enforce the Constitution and insure that the military departments observe the laws of Congress and their own regulations.

It is upon the chilling of his and others' rights to freedom of expression that petitioner based his request for relief by presentation of his record without his commander's retaliatory fitness reports among other unlawful actions before newly constituted promotion boards. Petitioner also asked that a new and lawful Article 138 investigation be ordered.

Far from disturbing order and discipline within the military, the relief sought by Captain Van Drasek would enhance military order and discipline by requiring the military to obey the law. A decision in Captain Van Drasek's favor would give rise to an order supporting a service member's right to speak out against unlawful acts as statutes and military regulations required Captain Van Drasek to do. If the trial court finds that Captain Van Drasek is correct in his assertions that the Article 138 investigation was constitutionally flawed, not a matter peculiarly fit for exercise of military discretion, a lawful investigation may be ordered. Finally, a decision in Captain Van Drasek's favor would support equal employment opportunity within the military, and it would also serve to eliminate command influence over the military justice system.

Petitioner submits that the district court's decision failed to undertake the constitutional review necessary to guarantee that " 'our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes.' " *Chappell v. Wallace, supra*, 462 U.S. at 304 *quoting* Warren, The Bill of Rights and the Military, 37 N.Y.U. L. Rev. 181, 188 (1962).[5]

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[5]Comprehensive protection of the First Amendment, even in a community recognized to have comprehensive authority to control conduct, has been long sustained by this Court. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.*, 393 U.S. at 506.

CONCLUSION

For the foregoing reasons, Captain Van Drasek respectfully requests that this Court reverse the United States Court of Appeals for the Federal Circuit as it sustained the district court's order affirming the decision of the Secretary of the Navy and granting respondents' motion to dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed, postage prepaid, to Charles Fried, Solicitor General, Department of Justice, Washington, D.C. 20530, this 22nd day of April, 1987.

STEPHEN G. MILLIKEN